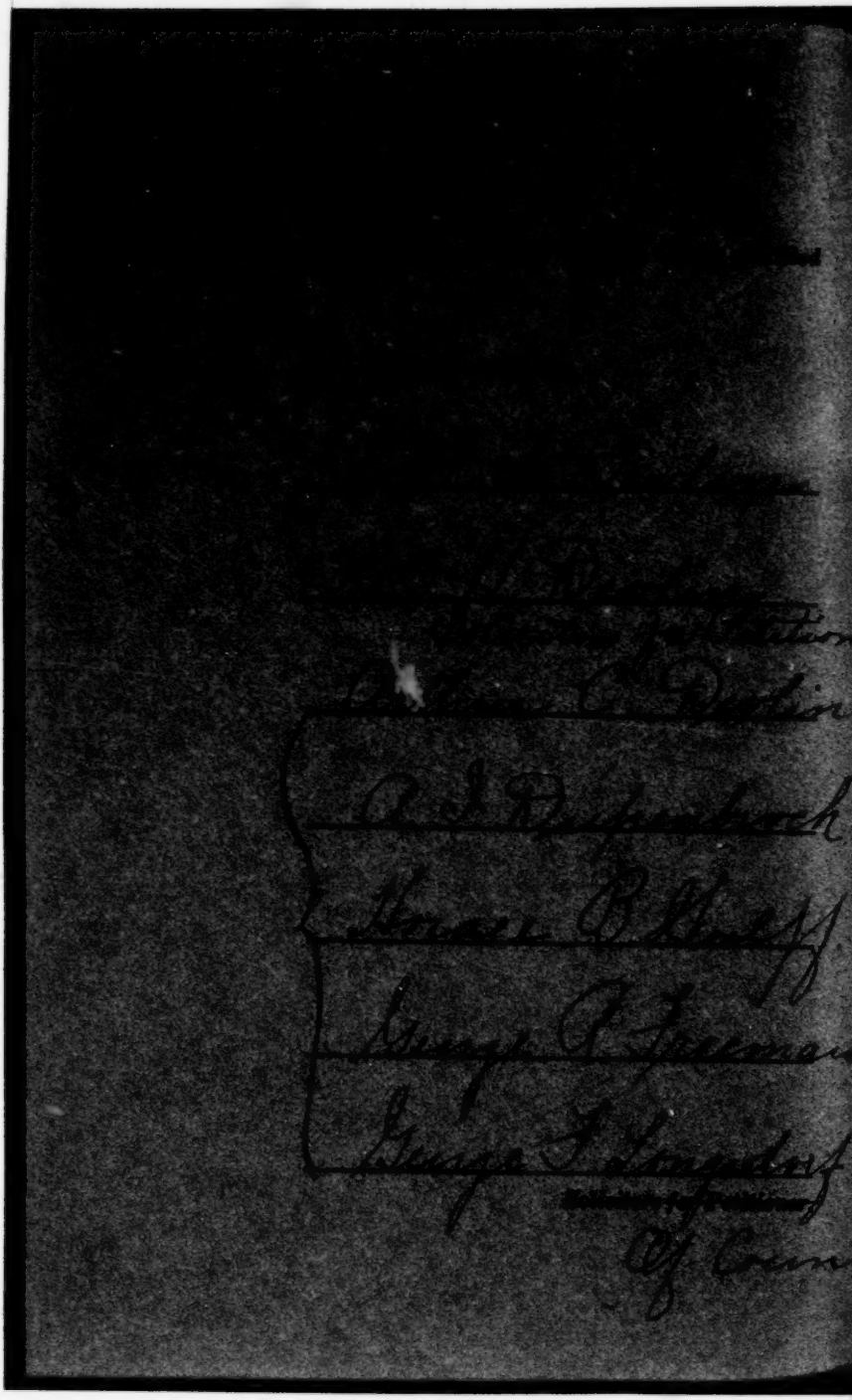

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CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

PETITION OF RESPONDENT FOR A REHEARING.

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At no time in this proceeding has Freeman as administrator, or petitioner, taken the position that Freeman, as such administrator has either disregarded, waived, disaffirmed or abandoned his security consisting of the assignment of the stock involved in this action, subject to the pledge of the respondent 2

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Respondent.

PETITION OF RESPONDENT FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Now comes the respondent in the above entitled action, and respectfully petitions for a rehearing of this case on the following points:

I.

AT NO TIME IN THIS PROCEEDING HAS FREEMAN AS ADMINTRATOR, OR PETITIONER, TAKEN THE POSITION THAT FREEMAN, AS SUCH ADMINISTRATOR HAS EITHER DISREGARDED, WAIVED, DISAFFIRMED OR ABANDONED HIS SECURITY CONSISTING OF THE ASSIGNMENT OF THE STOCK INVOLVED IN THIS ACTION, SUBJECT TO THE PLEDGE OF THE RESPONDENT.

As pointed out in the briefs, and in the oral argument, the bill of complaint made Freeman, as administrator, a party to this action, and alleged the validity of his assignment of the capital stock in question subject to the pledge to the respondent; also "that an accounting is necessary to ascertain what moneys, if any, were, at the time of said sale, and now are due or owing to said George R. Freeman upon the security of said transfer and assignment." Further "that it is necessary that the equities of all parties hereto be adjusted in one action; and that complainant is entitled to recover from defendant Peter Barceloux Company, the excess, if any, over and above the amount, if any, found to be due and owing to said George R. Freeman upon the security of said transfer and assignment at the time of said sale and still remaining due and owing, and the value of all of said shares of stock at the time of said sale."

Transcript of Record, pages 11 and 12.

The prayer of the bill is that the complainant have "judgment against defendant, Peter Barceloux Company, for the value of all of said shares of stock at the time of said sale, to-wit, August 16th, 1926, *less such sum, if any, as may be found to be due or owing*

to George R. Freeman, as administrator of the estate of Frank Freeman, deceased."

Throughout this appeal the respondent has attacked the judgment in this action on the ground that it awards the trustee in bankruptcy the full value of the stock, and not the value thereof, less the amount due Freeman as specifically alleged in the bill and in the prayer thereof.

At no time, either in the briefs, or in the oral arguments, has any attempt been made by the petitioner to answer this point.

Consequently, if this judgment is affirmed, and the full amount thereof is paid to the trustee, the latter is in the position of having recovered more than Fifty Thousand Dollars ($50,000.00) which, in his bill, he concedes to be the property of Freeman.

The answer to this proposition is found in the following quotation from the opinion rendered herein:

> "The argument for the defendant is that the Freeman administrator is estopped by force of his acceptance of a junior lien upon the shares, and that the trustee as his champion enjoys no better right. To overcome the supposed estoppel it is enough to recall the fact that at the time of the unlawful pledge the Freeman administrator was not the only creditor. The uncontradicted evidence is that there were many other creditors whose claims are still unpaid. What the trustee recovers will be for the benefit of all. Moore v. Bay, 284 U. S. 4.
>
> The result would not be different, however, if the administrator stood alone. Neither in his

own name nor indirectly through the trustee is he building any rights upon the pledge or claiming any preference over others. He has rejected the security and claims as a general creditor. There may have been obscurity as to this at the beginning of the suit. The bill of complaint which was a declaration by the trustee, and not by the administrator, gives recognition to the junior pledge as valid and subsisting. There has been no obscurity, however, since the trial and the interlocutory judgment. The pledge to the administrator is disregarded, and he is left in the same position with reference to any general creditors as if the transaction putting him ahead of them had been undone from the beginning. One who takes a mortgage or an assignment of an interest in property subject to a specific lien may be estopped while he retains the benefit from disavowing the attendant burden. Freeman v. Auld, 44 N. Y. 50, 53; Matter of Oakes, 248 N. Y. 280, 284. He either takes the security upon the terms conditioning the offer, or does not take it at all. The basis for an estoppel is cut away if the transaction is lawfully disaffirmed and the security abandoned. Old National Bank v. Heckman, 148 Ind. 490, 507. C. F. Bybee v. Oregon & Cal. R. R. Co., 139 U. S. 663, 682.

Disaffirmance and abandonment in this instance rested on sufficient grounds. The Freeman administrator, though informed of this fact that there was a pledge superior to his, had no knowledge of anything else. He was not informed of the circumstances essential to an understanding of the fraud. He did not even know, so far as

> the evidence discloses, whether the pledge was new or old. Only through later events was the collusive plan exhibited in all its sinister significance. There can be no irrevocable estoppel when the truth has been withheld."

We invite the attention of the Court to the fact that the defendant's position in this case is, not that Mr. Freeman was estopped by force of his acceptance of a junior lien upon the shares from questioning the pledge to the respondent, but that there was no fraud or attempt to hinder or delay him.

The position of the respondent is the same as that stated in the opinion of the Circuit Court of Appeals, that in this action the trustee has no cause of action other than, different from or in addition to a cause of action existing in favor of a creditor under the common law, and the statutes of California, to set aside any transaction made fraudulently and with the intent to hinder, delay and defraud the collection of his demand.

That it is an admitted fact in the case that at the time of this pledge, none of Mr. Barceloux's creditors were pressing him for payment, not even Freeman as administrator. The latter was only asking security.

It must be admitted that at no stage of this proceeding, as pointed out in the opinion of the Circuit Court of Appeals, has it been suggested that the pledge to the respondent was made with the intent to hinder, delay or defraud any creditor, except Freeman.

Consequently, our argument has been, and the decision of the Circuit Court of Appeals is, that in view of the situation of Freeman resulting from his having accepted an assignment of this pledge and with full knowledge of the facts, as well as his subsequent conduct of not questioning the pledge after he had knowledge of the sale thereof in September, 1926, and also in view of the further fact that no question was ever raised in regard to this pledge until this action was filed on April 3, 1928, there could be no fraud against Freeman.

As we understand the opinion of this Court, it is held that Mr. Freeman, as administrator, could not attack this pledge, because as the Court states in the above quotation "one who takes a mortgage or assignment of an interest in property subject to a specific lien may be estopped while he retains the benefit from disavowing the attendant burden. Freeman v. Auld, 44 N. Y. 50, 53; Matter of Oakes, 248 N. Y. 280, 284. He either takes the security upon the terms conditioning the offer, or does not take it at all."

We repeat and emphasize that this is an action for fraud based on the theory that the transaction was made with the intent to hinder, delay and defraud Freeman in the collection of his judgment, and as stated in the opinion of the Circuit Court of Appeals, there is nothing in this record to sustain the theory that the transaction was intended to hinder, delay or defraud any other creditor. Furthermore, at the time of this transaction, the bankrupt was taking care of his obligations and other creditors.

In the above paragraph this Court holds that the basis for an estoppel on the part of Freeman "is cut away if the transaction is lawfully disaffirmed and the security abandoned."

We respectfully submit that this question of disaffirmance and the abandonment of security by Freeman is not before this Court, and that neither Freeman nor the trustee at any time has taken the position that Freeman has either abandoned or disaffirmed this transaction. The only things appearing in the record on this subject are the allegations of the bill above mentioned. By these allegations, the trustee affirmatively asserted the validity of the Freeman assignment, and there is no pleading in this record that supports any theory that the trustee has abandoned the position taken by him in his verified bill.

Although joined as a defendant, Freeman as administrator, was never served and did not appear in the action. When the case was called for trial, petitioner availing himself of his right under the California statute, formally dismissed Freeman as a party. With this dismissal, George Freeman, as administrator of the estate of Frank Freeman, deceased, as a party, disappeared from this action.

It is true that George R. Freeman appeared as attorney of record for the trustee, petitioner herein, but it will not be contended that any conduct of George R. Freeman as attorney for petitioner could afford a basis for a finding that George R. Freeman as administrator of the estate of Frank Freeman,

deceased, had abandoned his rights under his assignment.

As a result, the respondent is left in this position. George R. Freeman, as administrator, is not bound by the decision of this Court that he has disaffirmed or waived his security.

The rights of the respondent by this opinion are fixed on the theory and the basis of the order affirming the decree, is that Freeman has waived his security. Therefore, the petitioner is permitted to recover money whch he alleges to be the property of Freeman, and the judgment is upheld as against this respondent on the theory that Freeman has waived his security, when such judgment in this action will not in any way prevent Freeman from asserting his security in the proper forum.

We therefore submit, that the recovery in this action must be predicated upon the assumption of the validity of the Freeman assignment, and that the petitioner's relief must be confined to the rights stated in the bill and the relief specifically prayed for.

The Court will note that throughout this proceeding, the petitioner, although frequently challenged with this proposition, has carefully refrained from making any statement or any commitment in any brief filed, or argument made, as to the validity of the Freeman assignment. This theory of the matter finds its first appearance in the opinion filed.

It would seem therefore to be conclusive that at most, the petitioner's recovery in this action must be

limited to the value in excess of the Freeman judgment.

Suppose Freeman should file an action against the Peter Barceloux Company for the value of this stock, or suppose there should be a controversy between Freeman and the trustee in bankruptcy as to the right of Freeman to so much of the recovery as may be necessary to discharge his demand, could it be contended that Freeman is bound by the decision of this Court in an action to which he is not a party?

So, we again call the attention of the Court to this phase of the decision and urge that a rehearing be granted, to the end that the judgment be affirmed on the ground that the case being predicated on the theory that it was to hinder, delay or defraud Freeman, that he cannot question the recovery; or if the trustee is entitled to recover, his recovery must be limited to the cause of action stated in the bill, to-wit: the value of the stock less the Freeman demand.

We also respectfully suggest, that to permit this opinion to stand in its present form, would be to adjudicate the rights of this respondent on the basis that Freeman, as administrator, had abandoned his security, when such adjudication will not bind Freeman, as administrator, from claiming the full amount of his security.

Will it be argued that when these funds are paid into the hands of the trustee, that this opinion will preclude Freeman as administrator from claiming the amount due on his judgment?

There is nothing in the record to show that Freeman as administrator is not building any rights upon his pledge or claiming any preference thereby, or that there has been any suggestion that Freeman as administrator has at any time disaffirmed the pledge or abandoned his security.

It is suggested that Freeman as administrator, though informed of the fact that there was a pledge superior to his, had no knowledge of anything else.

H. J. Barceloux testified that commencing with the affirmance of the judgment, and until some time in 1926, Mr. Freeman had direct knowledge of all of his properties, and assets, and that he kept nothing from him; that he knew everything. (R. 372.) Also that on numerous occasions while they were negotiating for the assignment of his interest in the Peter Barceloux Company stock he told Mr. Freeman that he owed the Peter Barceloux Company a considerable sum of money. (R. 374.)

These statements were not denied by Mr. Freeman. On the other hand, they are corroborated by the testimony of Mr. Freeman that his reason for not placing the amount of the indebtedness in the receipt, which he was asking the Peter Barceloux Company to sign, was probably because of his communication with Mr. Ware about the whole matter, and that there was something else to be considered. He testified: "I think probably there were other obligations which he owed the Peter Barceloux Company which were to go in the notice of assignment and I understood that." (R. 412.)

Also at page 401 of the Record, Mr. Freeman further testified:

> "In June, 1926, I did not have any notice that the Peter Barceloux Company held the stock of Henry J. Barceloux as security for any indebtedness *other than his statement to me that they had his stock as collateral for a loan or for a note of about $24,000.00 because he had previously given me a statement showing his indebtedness in $24,000.00 about.*" (Italics ours.)

On page 372 of the Record, H. J. Barceloux testified as follows:

> "Mr. Freeman, during the period commencing with the affirmance of the judgment until some time in 1926, had direct knowledge of my properties and assets. I told him what I had; kept nothing from him. I gave him statements and explained all about everything. He knew everything. I cannot state when I gave the statements to Mr. Freeman, but I think I gave him two."

It must be remembered that the bankrupt kept a full and complete set of books to which Mr. Freeman had access.

Is it to be assumed that Freeman, in view of the large amount of money due him, and the fact that he was seeking security therefor, did not make a complete and thorough investigation of the Peter Barceloux Company loan, as well as all other loans of the bankrupt? To credit him with anything less than this would be a reflection on his intelligence. Mr. Freeman testified that from the investigation he made, he concluded that Barceloux was solvent. It

does not appear that facts concerning his actual financial condition at the time of these transactions was unknown to Mr. Freeman and thereafter disclosed to him. Nothing appeared after the completion of these transactions which would show any collusion whatever in taking the written pledge to secure the indebtedness of the respondent.

Where is there any evidence of any fact that had been withheld from Mr. Freeman, or anyone else, concerning the property of the bankrupt or his affairs or his relations with respondent?

The pledgee's sale was conducted according to the strict requirements of the law of California, and in the same manner as thousands of sales under pledge or foreclosure are made. Notices were posted in three public places as required by law: One at the front door to the Court House; one at the Post Office, and the other on a telegraph pole at the sidewalk near Mr. Freeman's office. The sale was made on the steps of the Court House.

This Court in the case of *Hiscock v. Varick Bank,* 206 U. S., page 28, held that a sale of collateral security at public auction, without notice, and the purchase thereof by the pledgee, are not void as against the trustee in bankruptcy of the pledgor, in the absence of fraud where the contract of pledge permits such action, and is valid under the law of the state where such contract was made and executed and was to be performed. Also that the burden of proving that the sale by the pledgee of the property of bankrupt made conformably to the contract of

pledge was unfair is on the trustee in bankruptcy of the pledgor who seeks to avoid the sale.

The Court in that opinion points out that "the trustee did not offer to prove that others were prepared to purchase, and might have done so, but for want of information, or that the policies had a greater value than was realized at the sale, or that he was prepared to redeem the pledge for the benefit of the estate, nor did he offer to do so. There was nothing in the evidence tending to show a wanton sacrifice or an intention to buy in at so inadequate a price as to justify the inference of a fraudulent purpose."

We therefore respectfully submit, that a sale made in accordance with the contract of the parties, after notices posted as required by law in three public places, and in the most public place in the community, to-wit: the front door of a Court House, is not a legal gesture, but a strict compliance with the law, as well as the rule declared by this Court in *Hiscock v. Varick Bank,* supra.

Under the law, Freeman was not entitled to any notice. The law does not require the employment of an auctioneer. To offer the stock at public outcry and to wait for nearly an hour for a purchaser could hardly be said to indicate any sale to the disadvantage of anyone concerned. Also, it must be borne in mind that the pledge agreement in question waived notice and demand, and of course, there was no obligation on the part of the pledgee to make any demand or give any notice.

Consequently, the failure to make a demand or give notice cannot be made the basis for invalidating a contract which required neither.

Under the rule of *Hiscock v. Varick Bank*, supra, so far as the pledge in question is concerned, the respondent would have been within its rights had it been sold without demand or without notice.

II.

AS A MATTER OF LAW, AS WELL AS A MATTER OF FACT, THE EVIDENCE DOES NOT SUSTAIN A JUDGMENT AGAINST THE RESPONDENT.

The decision of the Circuit Court of Appeals is entitled to as much weight as the finding of the trial Court. Furthermore, under the rule of this Court, if there is any evidence sustaining the finding of the Circuit Court of Appeals, it will not be disturbed.

Varner v. New Hampshire Savings Bank, 24 U. S. 617; 60 L. Ed. 829.

Unquestionably the petitioner had the burden of proving by a preponderance of evidence that the transfer in question was made with the fraudulent intent of hindering, delaying and defrauding a creditor or creditors of the bankrupt. At the trial, the plaintiff offered no evidence in support of this charge, except the evidence of George and Henry Barceloux and Mrs. Gelinas and George R. Freeman.

Certificate No. 5, bearing the written endorsement of the pledge, was admittedly in the possession of the respondent. Likewise, the written contract of pledge

of shares of the Peter Barceloux Company was offered and admitted in evidence.

There is nothing in the testimony of Freeman, or any other witness, in any way impeaching the genuineness of these documents, or that the respondent was at all times in the possession thereof.

Consequently, if we adopt the rule that the testimony of George and Henry Barceloux and Mrs. Gelinas is to be wholly rejected and disregarded, then nothing is left in the record but the writings.

As a legal proposition, the presumption is of innocence and against fraud, the presumption of valid consideration, and the presumption of delivery arising from these facts must control and determine the action in favor of the respondent.

This situation of the record compelled the following admission, found on page 67 of petitioner's brief:

> "There is no conflict in the evidenec or the sequence of the various transactions between the bankrupt and the respondent company, but the only conflict, if any, is in the inferences that may be deduced from these facts."

It cannot be asserted in the face of the record and this admission of counsel that there was any direct evidence of fraud, but on the contrary, the whole case of the petitioner rests on inferences.

The essential element of fraud is intent. Unless the inference of fraudulent intent only can be proven from the evidence, then the finding must be in favor of the respondent.

Again, George and Henry Barceloux and Mrs. Gelinas stand unimpeached, and their testimony is consistent with every transaction made. It must be borne in mind that both the Peter Barceloux Company and H. J. Barceloux at all times kept a full and complete set of books and records and that the contemporaneous entries are all consistent with the testimony of these witnesses.

In the case of *Pennsylvania Railway Co. v. Chamberlain*, 77 Advance Sheets, No. 9, page 507, decided by this Court after the filing of the briefs in this action, the Court laid down this rule:

> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."
>
> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist."

This decision is squarely in point because this case must rest upon an inference either in favor of fraud or against fraud.

For the reasons stated in this opinion the petitioner cannot recover, because he has not sustained the burden of proof. Furthermore, under the rule that where two inferences are to be drawn from the same set of facts, one in favor of fair dealing and the other in support of corrupt practice, it is the express duty of the Court or jury to draw the inference in favor of fair dealing.

We, therefore, submit that as a matter of law, the plaintiff failed to sustain the burden of proof, and the evidence is insufficient to sustain a finding of fraud.

As to the other proposition stated in the quotation from the opinion of the Court, it is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, to draw an inference contrary to their evidence.

To emphasize our position that the evidence does not sustain a finding of fraud, and in justice to the respondent, as well as to this Court, we will take the liberty of directing attention to some of the statements contained in the opinion.

The opinion states that the book value of the property was over $90,000.00 and the actual value over $94,000.00. This statement should be weighed in view of the undisputed testimony that this book value does not represent any actual estimate of the value of the stock, but was a mere bookkeeping entry made at the time that the corporation was organized. George A. Barceloux testified on this subject on pages 193 and 194 of the record. His statement is:

> "Those valuations are an arbitrary valuation and there was no appraisement of the assets and the values placed on them were made for the purpose of opening our books and just to make the book entry, and according to our books the amount of our undivided profit is $35,861.24 on December 31, 1928, at the close of business last year."

That $90,000.00 could not be the fair value of the stock is manifest from the figures printed on pages 115 et seq. of appellant's opening brief in the Circuit Court of Appeals.

We will not burden the Court at this time with any detailed review of the figures, but will direct attention of the Court to the fact that the real property, the principal asset of this corporation, was not paying any profit whatever, and in some instances not yielding a sum sufficient to pay the taxes and the special assessments. Furthermore, that the corporation had been operating at a constantly increasing loss from 1926 to 1928, the date of the trial. Also that it was a family corporation; that its assets were subject to a reservation in favor of Lumina Barceloux for all of the net income thereof.

The opinion states "The business was a family affair, and strangers were not welcome within the family preserve."

At no time during these entire transactions did any occasion arise whereby any stranger was attempting to enter "the family preserve," with the possible exception of the acceptance of the assignment of the capital stock by Mr. Freeman. There is nothing in

this record that shows that this corporation at any time attempted to prevent Mr. Freeman from securing his debt, or from having any information concerning its affairs.

The opinion proceeds to state that "A time arrived when the unwelcome stranger seemed likely to break in. The family combined to maintain its solidarity and keep the intruder out."

First, it must be borne in mind that H. J. Barceloux borrowed $3000.00 from this corporation and paid it on the Freeman judgment with his knowledge. Barceloux drew a check on the funds of the corporation for $3000.00 and paid it on account of the Freeman judgment. (R. 303 and 304.) Was this an attempt to "keep the intruder" out?

The opinion states that "Freeman had been lenient."

The judgment was entered in favor of Freeman on July 25, 1921. Enforcement of the judgment was stayed on appeal.

Freeman v. Donohoe, 188 Cal. 170.

The judgment was affirmed and the remittitur filed on February 26, 1924. The pledges in question were made in June, 1926, or more than two years after the judgment was affirmed. So far as the respondent is concerned, there is no evidence of any action prior to the dates of the pledges in June, 1926.

On the other side of the picture, it is admitted that during this entire period of time and until the month of November, 1926, when Freeman attached without warning, Freeman and Barceloux and the latter's

attorney were cooperating to collect the judgment from Donohoe.

In view of this admitted friendly and cooperative effort on the part of Freeman and the judgment debtor, there was no reason for any activity on the part of anyone. This friendly relation existed at the time of the pledges and for months afterward. It is manifest that the bankrupt was only arranging his affairs to the satisfaction of his two principal creditors.

The second pledge was made after Freeman had accepted his security following a complete investigation of all of the bankrupt's affairs. The other creditors of Barceloux were few in number, and as stated in the opinion, were not importunate.

The Court states that "With these intruders visible, the family set out to build protective barriers."

All that this family did was to accept this pledge as security for an admitted indebtedness. If this family was intending to build a protective barrier, the shares in question would have been transferred unconditionally in satisfaction of the debt, instead of by pledge, so that Mr. Freeman could not take the assignment subject to the pledge, or levy execution thereon. Furthermore, the corporation did not take any steps to sell the property until August, 1926, notwithstanding the fact that it had the legal right under the rule laid down in *Hiscock v. Varick Bank*, supra, as far as these pledges are concerned, to sell without notice or demand.

The statement in the opinion that Mr. Freeman "was put off in June, 1926, with an assignment of the equity in the Barceloux shares, together with an assignment of an interest in heavily mortgaged lands," must be viewed in the light of the undisputed testimony that at no time did the respondent in this action ever request any delay, or any other act on the part of Freeman in connection with any of these transactions.

On the other hand, it must also be borne in mind that the bankrupt kept his agreement with Freeman to cooperate with him in the collection of the Freeman judgment against Donohoe, and that Freeman expressly admits that the bankrupt kept his agreement. (R. 401.)

The undisputed testimony of Mr. Barceloux is that he and his attorney stated to Mr. Freeman that it was his full intention to pay the judgment, but wanted his assistance in running down Donohoe to make him pay his half.

We respectfully submit that Mr. Freeman was not put off, but was assisted in the collection of his judgment. This is further evidenced by the payments made on the judgment.

The corporation was acting within its legal rights in refusing to agree to give Mr. Freeman ninety days notice before enforcing its security. The only inference that can be drawn from this, is that, if Mr. Freeman had the slightest idea of any fraud or fraudulent conduct, or any attempt to "put him off," he would have immediately instituted proceedings against this corporation or levied his execution on the capital

stock, or filed an action to attack the pledges on the ground of fraud.

The statement that the "defensive barrier was extended" after the request for notice was refused is not in harmony with the dates of the several transactions.

Both pledges had been fully completed as alleged in the bill and the property delivered to the respondent before any request was ever made for notice or demand, or for the ninety day agreement.

While it is true that the bankrupt owned a few shares of stock of other corporations not pledged as collateral, still Mr. Freeman with full knowledge of all the facts made his own selection, and if he accepted the stock of the respondent as collateral security, it was his choice made after full investigation, and not at the suggestion of either Barceloux or the respondent.

The cancellation of the certificate and the issuance of the new one was simply in accordance with law and the usual practice of transferring shares of stock when pledged as collateral security for a loan.

Again it is stated in the opinion "He had equities in other properties, lands and shares of stock. He sold part to his sister and part to his wife. The value in each instance was in excess of the price."

For the sake of the record, we wish to call the attention of the Court to the evidence on these two points. The only testimony as to the transaction between the bankrupt and his wife is that of the bankrupt. (R. 355 and 370.) His testimony is that he was selling a

contingent interest to his wife to borrow $1000.00 from her separate funds to pay a power bill and other expenses connected with his business affairs. He testified that she lost $80.00 on the deal. (R. 370.) This is the only testimony on the subject. If it is to be rejected, then the record is silent.

We, therefore, submit that this cannot be accepted as any badge of fraud.

We next direct the attention of the Court to the transaction between the bankrupt and his sister, Mrs. Gelinas, after Freeman had taken his security. This is a similar situation. It involves no relation of debtor and creditor. It was an outright sale and purchase. The only evidence on the subject except that of Mrs. Gelinas and Henry Barceloux is the testimony of Mr. Freeman as to his investigations of the value of this stock, the amount of the loan and his refusal to accept the same as security for his debt.

On pages 402 and 411 of the record, the Court will find that Mr. Freeman testified that he went to the various banks and found out the amounts that were against them. That he personally called upon the Peoples Bank and the United Bank and Trust Company to ascertain the condition of the loans. He refused to accept this security which had been tendered to him by Mr. Barceloux.

After the completion of the pledges by Barceloux to the respondent and appellant, according to the testimony of Mrs. Gelinas and Barceloux, the latter approached her with the proposition of taking over the stock pledged to these two banks subject to the debts against it, which had been previously refused

by Mr. Freeman. It was finally agreed that Barceloux would sell the stock to Mrs. Gelinas, she to assume the amount of the obligation against it and to pay him $2000.00 in cash. This stock consisted of 158 shares of the Glenn County Bank valued by the Master at $70.00. This valuation by the Master was rejected by the trial Court on the motion of the plaintiff and the valuation increased to $125.00 per share. (R. 103.)

Judge Sawtelle, in his dissenting opinion, reversed this finding and restored the value to $70.00 a share. Aside from this, the valuations placed on the stock by the parties is controlling. The valuation of the assets taken over by Mrs. Gelinas would then be as follows:

158 shares of Glenn County Bank, $11,600.00.

26 shares United Bank and Trust Company, $2600.00.

35 shares Union Trust rights, $350.00.

Total value, $14,550.00.

The amount of the indebtedness was $13,800.00, and Mrs. Gelinas paid $2000.00 additional in cash, a total of $15,800.00. This is $1250.00 in excess of the value.

If this is not sufficient to demonstrate that she did not pay less than the value of the shares, we call attention to the testimony on page 393 of the record. To take up these loans, Mrs. Gelinas executed two notes, one for $6000.00 to the Peoples Bank and one for $7800.00 to the United Bank and Trust Company, and she gave 26 shares of City Service and 41 shares of Tidewater Associated Oil Company as additional security for the loan.

We respectfully request that this statement should be expunged from the opinion of the Court, because a case is pending in the United States Circuit Court of Appeals by the trustee in bankruptcy, petitioner in this action, against Mrs. Gelinas involving this transaction. An attempt will be made to use this statement in that litigation to the disadvantage of Mrs. Gelinas.

The whole record in the Gelinas case is not before this Court. If we accept the testimony of Mrs. Gelinas, the statement is not supported by the record, and if we reject her testimony, there is no evidence on the subject.

The transfer of the office fixtures by the bankrupt to his attorney was after Mr. Freeman had levied the execution on all of the property of the bankrupt which he desired to subject to his demand.

We also suggest to the Court the point made in the brief that the Peter Barceloux Company is not bound by any transfer made subsequent to the pledge, and mentioned in the opinion of the Court, for the reason that it was not a party to any of such transactions. As a matter of law it cannot be so bound.

The bill in this action does not allege any general plan or scheme or conspiracy to defraud anyone. It simply attacks two transfers. These transfers were separate and independent transactions between the respondent and Barceloux and had no connection whatever with any of the other transfers mentioned in the opinion or shown by the evidence.

There is nothing in this evidence to show that the members of the Peter Barceloux family are other than people of the highest standing and responsibility in the communities in which they reside, and they should not be subjected to the odium and disgrace of a finding that they were guilty of fraudulent practice as charged in the bill and stated in the opinion, in the absence of strong and conclusive evidence of their guilt, particularly in view of a contrary finding by the Circuit Court of Appeals.

In any event, this judgment should be modified to reduce this recovery to the right claimed by the plaintiff in the bill, to-wit: The value of the stock less the amount due Freeman on his judgment.

We, therefore, earnestly request this Court to reconsider the case in the light of the foregoing suggestions and that the opinion of the Circuit Court of Appeals be affirmed.

Dated, Woodland, California,
April 24, 1933.

Respectfully submitted,
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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for respondent and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Woodland, California,
April 24, 1933.

ARTHUR C. HUSTON,
Of Counsel for Respondent and Petitioner.